JUN 8 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. 45 Misc.

LEONARDO SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

RUDOLPH STAND,
Counsel for Petitioner,
Office & Post Office Address,
80 Broad Street,
New York 4, N. Y.

JACOB SHIENTAG,
Attorney for Petitioner.

INDEX

	PAGE
Petition for Certiorari	1
Summary Statement of Matter Involved	1
Jurisdiction	4
Questions Presented	6
Statement of the Case	7
Reasons for Granting of Writ	16
Conclusion	25

Table of Cases Cited

Andres v. United States, 333 U. S. 740	16
Betts v. Brady, 316 U. S. 455	5
Buchalter v. New York, 319 U. S. 427	24
Chambers v. Florida, 309 U. S. 227	5, 25
Dist. of Columbia v. Armes, 107 U. S. 519	18
Frank v. Mangum, 237 U. S. 309	16
Hebert v. Louisiana, 272 U. S. 312	16
Hill v. Texas, 316 U. S. 400	16
Lisenba v. California, 314 U. S. 219	5
Lyons v. Oklahoma, 322 U. S. 596	5
Moore v. Dempsey, 261 U. S. 86	24
McNabb v. United States, 318 U. S. 332	16
Nudd v. Burrows, 91 U. S. 426	16
Ong Chang Wing v. United States, 218 U. S. 272	16

PAGE

Pennekamp v. Florida, 328 U. S. 331 23
People v. Buchalter, 289 N. Y. 181 24
People v. Odell, 230 N. Y. 481 16
People v. Ohanian, 245 N. Y. 227 18
People v. Robinson, 273 N. Y. 438 23
People v. Salemi, 306 N. Y. 863 2
People v. Zackowitz, 254 N. Y. 192 23

Rochin v. California, 342 U. S. 165 24
Rogers v. Alabama, 192 U. S. 226 6

Sheperd v. Florida, 341 U. S. 50 23
Smith v. Baldi, 344 U. S. 561 .....12, 19
Smith v. Texas, 311 U. S. 128, 130 5

OTHER AUTHORITIES CITED

United States Constitution:
Sixth Amendment 3, 14
Fourteenth Amendment 3, 4, 5, 6, 13, 14, 16, 24

United States Code:
Title 28, Sec. 2101 (c) 4
Title 28, Sec. 1257 (3) 4

Rules of the Supreme Court of the United States:
Rule 38 ..... 4, 5
Rule 38½ 4
Rule 12(1) 5

Frankfurter, The Case of Sacco and Vanzetti, p. 103. 18

Wharton, Crim. Ev. 11th Ed. Sec. 1171 16

Wigmore, Evidence, 3rd Ed. Sec. 497 17
Wigmore, Science of Judicial Proof, 3rd Ed. Sec. 250-4 17

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953

No. ..... Misc.

LEONARDO SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

TO THE HONORABLE THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, Leonardo Salemi, respectfully prays that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, entered March 12, 1954, affirming by a divided court of 4-to-3, a judgment of conviction and sentence of death imposed by the Court of General Sessions, New York County, upon a verdict convicting petitioner of the crime of Murder in the First Degree.

Summary Statement Of Matter Involved

The petitioner was convicted on November 20, 1952 of Murder in the First Degree, after trial before the Hon. Jonah J. Goldstein, and a special or so-called "blue

ribbon" jury in the Court of General Sessions, New York County (16; 1761) *

Before rendition of judgment on the jury's verdict, an application was made for a new trial upon the ground of newly discovered evidence and the deprivation of the defendant's fundamental constitutional rights (1798-1800; 1805-6; 1862-3). The record in the proceedings upon the application for a new trial is contained in Vol. I of the record on appeal (pages 600-724); Vol. II (pages 725-1376). The motion was denied with an opinion rendered by the trial judge (4111-4128).

The petitioner was sentenced to death on June 24, 1953 (4129-4131; 4188-4190). An appeal was taken from the judgment of conviction and from the order denying the motion to set aside the jury's verdict upon the ground of newly discovered evidence (4-6).

The New York State Court of Appeals affirmed the judgment of conviction, without opinion, by a *divided* Court of *four-to-three.* The case is reported in 306 N. Y. 863 as follows:

> "*People, &c., res.* v. *Salemi, ap.*—Judgment of conviction affirmed. No opinion. All concur except Lewis, Ch. J., Desmond, and Van Voorhis, J. J., who dissent and vote for reversal and a new trial on the ground that the Court's charge did not 'marshal the evidence' as required by *People, &c.,* v. *Odell* (230 N. Y. 481)."

Petitioner thereafter moved for reargument of the appeal by printed notice of motion and memorandum annexed, returnable April 5, 1954, which motion was denied, without opinion, on April 15, 1954.

In the event of the denial of the application for reargument of the appeal, petitioner moved for an order to recall

---

* References, unless otherwise indicated, are to the folios of the certified record on appeal submitted herewith.

and amend the remittitur, to set forth the following:

"Upon the appeal herein and upon the motion for reargument thereof there were presented questions under the Constitution of the United States:

(1) The Appellant contended that his rights were violated under the Sixth and Fourteenth Amendments to the United States Constitution by receiving in evidence against him the testimony of one Paul Janson who was allegedly an incompetent and insane person at the time he testified.

(2) That the defendant was deprived of due process of law under the Fourteenth Amendment of the Constitution of the United States in each of the following respects:

(a) The denial of his motion for a new trial on the ground of newly discovered evidence and for related relief;

(b) The receipt in evidence upon the motion for a new trial of the testimony of various witnesses who testified before the Grand Jury and also various newspaper articles which appeared in the public press concerning the death of a witness who had testified before the Grand Jury, and who had been allegedly murdered before the trial and all of which was related in said articles to the case then pending against the defendant;

(c) That the order of the Trial Court granting the District Attorney's motion for a special Jury to try the issues herein, over the objection of the defendant, was based upon insufficient papers and the Court's refusal to dismiss said Special Jury panel constituted a denial of due process and a violation of defendant's rights under the Fourteenth Amendment of the Constitution of the United States; that the application of Section 749-aa, Subd. 4 of the Judiciary Law of the State of New York under which said

order for a Special Jury Panel was made constituted a denial of due process and a violation of defendant's rights under the Fourteenth Amendment to the Constitution of the United States.

(3) Upon the Appeal herein and upon Motion for Reargument thereof defendant contended that he did not receive a fair trial by reason of the failure of the Trial Court to marshal any of the evidence in the case in the charge to the Jury and that such failure constituted a denial of due process and a violation of defendant's rights under the Fourteenth Amendment to the Constitution of the United States."

This motion was denied, without opinion, on April 15, 1954.

Petitioner then moved for reargument of the motion to recall and amend the remittitur as aforestated, which application was returnable April 22, 1954 and was thereafter denied, without opinion.

Certified copies of the documents above referred to are submitted herewith in support of this petition.

Mr. Justice Reed granted a stay of the execution of the petitioner, by order dated April 24, 1954, pending the filing and final disposition of the petition for writ of certiorari herein.

Jurisdiction

1. The judgment of the New York State Court of Appeals sought to be reviewed was entered March 12, 1954.

2. This petition was filed within ninety days after the entry of such judgment as required by law (28 U. S. C., § 2101(c); Supreme Court Rule 38½).

3. The jurisdiction of this Court is invoked under 28 U. S. C., § 1257(3) and Rule 38 of the Rules of the Supreme Court of the United States.

4. The petitioner challenges the validity of the judgment of conviction and sentence of death on the constitutional ground of denial of due process of law in violation of the Fourteenth Amendment of the Federal Constitution. In compliance with Rules 12(1) and 38, we set forth later under the heading "Statement of the Case", the particulars relating to the raising of the substantial federal questions involved in the trial court; on the application and hearing for a new trial on the ground of newly discovered evidence; in appellant's main and reply briefs before the New York State Court of Appeals; on the printed motion for reargument of the appeal after affirmance of the judgment; on the motion to recall and amend the remittitur and on the motion for reargument of the motion to recall and amend the remittitur.

5. We believe that the cases later cited in this petition sustain the jurisdiction of this Court to grant the writ of certiorari in the exercise of the Court's discretion, notwithstanding the refusal of the New York State Court of Appeals to pass upon the Federal questions herein presented.

Upon review of a state court decision wherein a claim under the Federal Constitution was denied, this Court will examine and appraise for itself the evidence relating to such right. Otherwise, review by this Court would fail of its purpose in safeguarding constitutional rights (*Smith* v. *Texas,* 311 U. S. 128, 130; *Chambers* v. *Florida,* 309 U. S. 227, 228-9).

The asserted denial of due process of law is to be tested by an appraisal of the totality of facts in a given case (*Betts* v. *Brady,* 316 U. S. 455, 462). The Fourteenth Amendment protects against such conduct of criminal trials in state courts as amounts to a disregard of that fundamental fairness essential to the very concept of justice and as necessarily prevents a fair and impartial trial (*Lisenba* v. *California,* 314 U. S. 219, 236; *Lyons* v. *Oklahoma,* 322 U. S. 596, 605).

This Court has the power to examine into the raising of the federal question and if the highest state court's refusal to deal with that question is erroneous, the Supreme Court's jurisdiction can be asserted (*Rogers* v. *Alabama*, 192 U. S. 226, 230-1).

Questions Presented

I. Whether the right of a defendant to be accorded due process of law under the provisions of the Fourteenth Amendment to the Constitution of the United States has been invaded and violated, when the trial court received in evidence against defendant, the testimony of one Paul Janson, an incompetent and insane person, which fact was known to the prosecutor, but undisclosed to the defense and not divulged to the jury.

II. Whether the defendant was deprived of due process of law under the Fourteenth Amendment of the Constitution of the United States in each of the following respects:

(a) the denial of his motion for a new trial on the ground of Janson's mental condition discovered after the jury's verdict, especially since he was the only identifying witness in the case;

(b) The receipt in evidence upon the hearing for a new trial of the testimony of various witnesses who testified before the Grand Jury, but who were not produced as witnesses at the trial and who were never cross-examined;

(c) the receipt in evidence of various inflammatory newspaper articles concerning the alleged murder before the trial of a Grand Jury Witness and all of which was related in said articles to the defendant and the case pending against him.

III. Whether the defendant was denied due process of law in violation of his rights under the Fourteenth Amend-

ment to the Constitution of the United States by the trial court's total failure to marshal any of the evidence in the case and in charging only general legal abstractions.

Statement of the Case

In order to obtain a clear view of the facts material to the questions presented here, a brief outline of the case becomes necessary. Two sets of proceedings in the record on appeal must be differentiated,—(1) the trial; and (2) the motion and hearing for a new trial, which took place before the court imposed the death sentence on the petitioner.

The Trial

About 8:30 o'clock in the evening of February 26, 1952, one Walter Forlenzo was shot and killed in a bar and grill in New York City (176-7). Many people were in the place at the time of the shooting (200-1; 219). A man, with gun in hand, was seen standing at deceased's table as he slumped from his chair to the floor. The man with the gun left without interference and the place was rapidly emptied of its occupants (307-318).

Only two of the many persons who were in the place, were called as witnesses. Andrew Bertorelli, one of the owners of the bar and grill, testified that he saw the defendant at the bar that evening some time prior to the shooting but not thereafter. Bertorelli was in the kitchen, to the rear of the dining room, when he heard shots and did not witness the occurrence (174-202).

A customer, Paul Janson, about whom a substantial part of this case and the motion for a new trial is concerned, testified that he was drinking at the bar and watching a television program when he heard two shots fired* (304-5).

---

* After Janson's commitment to Pilgrim State Hospital as an insane person, he told the doctors that 75 people were present in the bar and grill the night of the shooting (3077). Upon the hearing for a new trial he swelled that number to 125 people (3063-6).

Upon the trial he identified the defendant as the man he saw standing at the table with gun in hand while the deceased slumped to the floor (305-7; 312-3). He claimed he saw the defendant's face for about two seconds and testified that he had seen the defendant in the bar on two or three previous occasions, the last being about a year and a half prior, but had never spoken to him (368; 382-4).

The day following the shooting, Janson was interviewed by the police and the District Attorney's Office but steadfastly denied knowing anything at all about the matter (376-382). He persisted undeviatingly in this denial for several months although questioned at various times by the police and members of the District Attorney's staff (626-632).

On July 2, 1952, Janson was committed as a material witness to the City Prison (626). Up to that time and for several weeks thereafter, he still denied knowing anything about the shooting (633-638). He was not a witness before the Grand Jury which found the indictment against the defendant (399).

At various times, the authorities showed Janson pictures, which included photographs of the defendant. He picked out the defendant's picture but his identification was merely that of a man whom he claimed to have seen in the bar and grill on previous occasions. Up to July 23rd, Janson resolutely insisted, however, that he had not seen the defendant on the night of the shooting (446-452; 503-8; 545-6).

On November 11, 1952—the day before the trial commenced—Janson ran headlong into some iron bars up at the prison where he was held as a material witness (326). Eight stitches were taken in his scalp to sew the lacerations of his self-inflicted injuries (624). That this was an attempted suicide was known to the prosecutor, but not disclosed to the defense and not divulged to the jury. Janson was brought to the District Attorney's office the following day, November 12th, when the trial began and was kept there all day without medical attention. That

night he was taken to a hotel under police surveillance and not returned to the city prison as required by the order of commitment (2225-8; 2240-6).

The following afternoon, November 13th, Janson gave his testimony which was not completed that day. He then identified the defendant as the man with the gun, although Janson was never asked to pick out the suspect in a "line-up" with other persons (474-5). At the close of the court session, the trial judge directed that he be placed in the custody of police (395) and as was later discovered he was maintained incommunicado at a hotel under twenty-four hour round-the-clock police observation during the week that the case was on trial.

As was also later discovered, during that week, Janson stopped eating, smoking and talking, kept to himself and just stared at the walls of his room and was not submitted for examination to any physician (2232-2241). He was "very morose and melancholy" (2286). These facts were known only to the police and the prosecutor (2243).

*Janson was the only alleged eye-witness to the homicide.** Thus, the main issue in the case turned upon the reliability of Janson's testimony of personal identification of the accused. There were no confessions or admissions in evidence.

No motive whatever was shown for the killing. There was no evidence of any previous threats or ill-will between the deceased and the defendant. The defendant voluntarily surrendered himself in the District Attorney's Office

---

* On the application for a new trial, defense counsel sought to establish that Janson was incapable of giving a trustworthy account of the matters allegedly witnessed by him because of his deranged mental condition at the time of the trial (3972-3996). Janson's statement to the prosecutor on July 23, 1952—in which he declared that he wanted to tell "the whole truth" (Deft.'s Ex. F, p. 1425) was in direct contradiction with the testimony he gave on the trial, which fact was conceded by the District Attorney (4091-2).

on May 14, 1952 (934; 945). The police officer in charge of the case testified that he did not know whether or not the defendant at any time knew that the police were looking for him (944).

The defense was an alibi (1008-1233).

On the night of November 20th, the jury returned a verdict of guilty of Murder in the First Degree (1761). The Court fixed December 12, 1952 as the date of sentence of the defendant (1772).

The Motion for a New Trial

The morning after the jury's verdict—November 21, 1952—marked the beginning of a series of most unusual events, revealing the danger of convicting the innocent which has been so often shown to lurk in the sort of identification testimony upon which the prosecution here relied.

On that day, the witness Janson was brought to the District Attorney's Office and then for the first time was examined by the prosecutor's medical assistant (1936-1941). Janson was found to be completely insane, suffering from delusions and hallucinations, was markedly depressed and had suicidal tendencies, and was immediately sent to the Psychiatric Division of Bellevue Hospital (1936-1941). He was then in such a deranged mental condition that, according to the prosecutor's own psychiatrist, it would have been improper to call him as a witness for any purpose (3534-6).

On Janson's admission to Bellevue Hospital, the admission notes revealed the following:

"HISTORY: 11/21/52 (why here)

I was a witness on a trial—a man was in a shooting in the Belvedere Bar and Grill—I saw the fellow

run out—I saw his face—I was standing at the end of the bar—*It's up to me to convict him but I can't be sure of the victim—I mean of the man who done the shooting*" (1943) (Emphasis supplied).

At Bellevue Hospital, Janson again continued to exhibit delusional and hallucinatory ideas. Four days later he again attempted suicide by cracking open his skull and was so disturbed that he had to be transferred to another ward (1944-1947). He was "guilt-ridden because of testimony he gave in court * * * insight lacking. Judgment impaired" (1948). He was suffering from an "involutional psychosis" and given an emergency electric shock treatment (1949).

On December 2, 1952, an order was made by the Supreme Court, Bronx County, upon the certificate of two doctors, committing Janson as an insane person to Pilgrim State Hospital. He was then diagnosed as suffering from schizophrenia (2062-3).

At Pilgrim State Hospital for the Insane, the admission note on December 4, 1952 relating to Janson indicated the following:

"* * * He gave the following explanation of why he was sent to Bellevue for observation. *'I happened to be a witness in a shooting affair in a cafe. I didn't see the shooting but turned around right after the shooting was over. I got a glimpse of the man's face that did the shooting. When the case came up in September, I identified the man in court. Afterwards, I wasn't sure so that way I rammed my head into the iron bars in the place where I was staying at the Bronx Jail. After I hit my head, they were still waiting for me to identify him again to make sure. They tried to calm me down, the D. A. I slept at a hotel. I never got back to the trial. I was dropped at Belle-*

*vue for a check-up. * * * I always imagine somebody is whispering. I always have a suspicion that they despise me. They look and talk at me.' * * *"* (1986-1988)—(Emphasis supplied).*

Before the defendant was arraigned for sentence and sometime in January 1953, information was acquired by defense counsel concerning the commitment of Janson to Bellevue Hospital for observation the day after the jury's verdict, and his later commitment as an insane person to Pilgrim State Hospital (2881-3).

The hospital records, however, were first made available to the defense in February, 1953 (2883) and from other investigations resulting therefrom, startling facts emerged relative to Janson's mental condition—all clearly indicating that Janson's kind of mental illness did "not set in overnight but [was] the culmination of a long process".** (2155-2181).

Based upon the discovery of the foregoing facts which we have presented in broadest outline, an application was made for a new trial upon the ground of newly discovered evidence and the deprivation of the defendant's constitutional rights. The moving papers are incorporated in the record on appeal (pp. 600-673). No counter affidavits were filed in behalf of the prosecution. Hearings thereon were held before the trial court beginning May 19, 1953 (Vol. I, pp. 674-724; Vol. II, pp. 725-1370).

---

* Janson attempted suicide on Nov. 11 (326). The trial began Nov. 12 (32). Janson testified on Nov. 13-14 (250; 280; 397). The record, including the hearing on the motion for a new trial, abounds with instances too extensive for complete presentation upon this application which demonstrate the untrustworthiness of this insane witness.

** See opinion of Mr. Justice Frankfurter in *Smith* v. *Baldi*, 344 U. S. 561, at page 572. Later reference will be made to this case.

Raising of Federal Questions In the Trial and Appellate Court

(1) In the affidavit supporting defendant's motion for a new trial upon the ground of newly discovered evidence presented to the trial court, defendant raised the federal question of deprivation of his fundamental rights because the insane witness Janson was permitted to testify against him (Record on Appeal, pp. 602, 621). At page 621, defendant contended:

> "There resides in this Court the inherent power to rectify a wrong and prevent a miscarriage of justice. Judgment has not yet been pronounced. It is apparent that by reason of the circumstances now disclosed the fundamental rights of the defendant under the Federal and State Constitutions and the provisions of the Code of Criminal Procedure guaranteeing the absolute right to be confronted by witnesses were violated."

Upon three separate occasions before the Appellate Court, defendant contended with respect to the testimony given by the insane witness Janson, that defendant was deprived of due process of law within the intendment of the Fourteenth Amendment to the United States Constitution:

(a) Printed motion for reargument and memorandum annexed thereto (p. 9);

(b) Motion to recall and amend the remittitur, dated March 25, 1954 (pp. 1-2);

(c) Motion for reargument of motion to amend the remittitur dated April 20, 1954, affidavit of Jacob Shientag (pp. 3-4).

(2) During the proceedings upon the application for a new trial, the trial court received in evidence all of the testimony that had been given by witnesses called before the Grand Jury, in spite of the vigorous protest and objection of defense counsel that such ruling was highly prejudicial and essentially unfair (R. pp. 981-987; Balance of Grand Jury Testimony, reproduced in Record at p. 1413).

This ruling—lacking every element of fundamental fairness—resulted in bringing into the proceedings evidence of witnesses who had not testified at the trial; who did not confront the defendant upon the trial and who were not subject to cross-examination and were never cross-examined. No preliminary hearing was ever held before a magistrate. This ruling was a flagrant violation of petitioner's rights under the Sixth and Fourteenth Amendments of the United States Constitution.

Upon the motion for reargument of the appeal in the Appellate Court, defendant urged this federal question (Printed Motion for reargument and memorandum annexed p. 10; Motion to recall and amend remittitur, pp. 1-2; Motion for reargument of motion to amend remittitur, affidavit of Jacob Shientag, p. 4).

(3) The trial court also received in evidence, despite objection and exception, upon the hearing for a new trial, and in further violation of every concept of due process of law most damaging and prejudicial newspaper articles referring to the alleged killing of one Basilio Paiutta, a Grand Jury witness on July 2, 1952 and also concerning defendant and his past life and related the death of this man who was an alleged witness to the homicide, to the defendant and the case then pending against defendant. (Record on Appeal, pp. 889-890).

The defendant had voluntarily surrendered on May 14, 1952 and was in custody at the time (R. pp. 298, 312, 315).

These excerpts from the newspapers are reproduced in the Record on pages 1407, 1409 and 1411.

Pursuant to the command of statute, the defendant was asked on the day of sentence whether he had any legal cause to show why judgment of death should not be pronounced against him (R. p. 1381). In his lengthy statement (pp. 1382-1396), among other things, defendant protested his innocence in an impassioned plea and bitterly complained that he did not receive the fair trial to which by law and justice he was entitled (R. p. 1393).

Defendant, in the course of his plea, declared:

> "And for the benefit of the Justices of the High Courts, I say with extreme care, your Honors, the part this Court has played in this farce referred to as my trial, and see if it wasn't the killing of Basilio Paiutta that I was tried for, along with the killing of Walter Forlenza, which held little or no water at all" (p. 1393).

Defendant concluded as follows:

> "* * * I nevertheless feel confident that in the final analysis, the High Court will take a hand in correcting this unexpected verdict, in which the weight of the evidence is definitely contrary to the verdict returned. That is what the High Courts are for, to see that the elementary concepts that stand ingrained in our legal framework are carried out to the very letter of our laws and stand to be used whenever life or liberty is in peril * * *" (R. p. 1395).

On this question, defendant contended before the Appellate Court that such patently incompetent and inflammatory evidence prevented the trial court from making any proper determination of the Motion for a new trial (Printed Motion for reargument of appeal and memoran-

dum, pp. 10-12; motion to recall and amend remittitur, pp. 1-2; motion for reargument of motion to amend remittitur, affidavit of Jacob Shientag, pp. 4-5).

(4) In the main brief submitted to the Appellate Court, defendant contended (pp. 64-68), among other things, that he had been deprived of a fair trial because of the total inadequacy of the charge, citing among other cases, *People* v. *Odell,* 230 N. Y. 481; *Nudd* v. *Burrows,* 91 U. S. 426, 439. In the brief on reargument of the appeal (pp. 4-6), defendant contended that his constitutional right to a fair trial guaranteed under the Fourteenth Amendment of the Federal Constitution had been violated by the total inadequacy of the Court's charge to the jury. The following cases, among others, were cited: *Andres* v. *United States,* 333 U. S. 740, 765; *Ong Chang Wing* v. *United States,* 218 U. S. 272, 279 and *Hill* v. *Texas,* 316 U. S. 400, 406.

Reasons for Granting the Writ

The special and unusual circumstances of the record show a manifest violation of petitioner's rights to a fair, impartial and deliberate trial guaranteed under the Due Process Clause of the Fourteenth Amendment.

In determining whether one convicted of crime has been denied due process of law, the entire course of proceedings, and not merely a single step, must be considered (*Frank* v. *Mangum,* 237 U. S. 309, 331, 332). It is sufficient reason for granting the writ that the case presents serious questions in the administration of criminal justice (*McNabb* v. *United States,* 318 U. S. 332, 339, 340; *Hebert* v. *Louisiana,* 272 U. S. 312, 316).

The Insane Witness, Paul Janson

The fundamental value of all testimony is its trustworthiness (Wharton, *Crim, Ev.,* 11th Ed. § 1171). Evidence of identification of accused persons—especially in a

capital case—ought to be certain and reliable for "some of the most tragic miscarriages of justice have been due to testimonial errors in this field" (*Wigmore, Science of Judicial Proof,* 3rd Ed., § 250-254).

As already stated, petitioner moved for a new trial as soon as he discovered the facts relating to Janson's insanity. Was Janson's testimony at the trial and at the hearing for a new trial, the fabric of a disordered and deranged mind?

In the trial court's opinion denying petitioner's motion for a new trial it is stated, among other things, after briefly referring to the testimony of the psychiatrists called by the defense and the People (R. 1374-1375):

> "The issue of the competency of a witness is for the Court—it is not to be decided by experts. The opinions of experts are only for the Court's guidance.
>
> Even though a witness is insane after inquiry by the Court, he may be competent to testify. • • •
>
> From my observation of Janson, both at the trial and at the hearing on this motion, and considering all the testimony at the hearing, I find as a fact that on both occasions he was competent to testify. His testimony at this hearing was substantially the same as that which he gave at the trial".

It is true that under the division of function between judge and jury, the question of competency of a witness is a preliminary question for the court, but, as stated in Wigmore, *Evidence,* 3rd Ed. § 497, pages 590-1:

> "• • • after the Court has passed on the witness' capacity, it is still open to the jury to conclude that the witness is not credible and to reject the testimony entirely; and the Court's decision does not necessarily affect the estimate which the jury must make".

Credibility of the witness is distinct from admissibility. It was for the jury—and the jury alone—to decide what amount of credit shall be given to the testimony of a lunatic or insane person (*District of Columbia* v. *Armes*, 107 U. S. 519, 523). Such issue was never submitted to a jury in the case at bar.

Indeed, in this case, no inquiry was conducted by the court as to Janson's competency to testify at the time of the trial and the jury was kept wholly in the dark as to Janson's true mental condition which, if disclosed, might well have changed the result and have meant the difference between acquittal and death for the defendant. The newly discovered evidence bore directly on Janson's aberration upon the specific subject of his alleged identification of the defendant.

The criterion that should have been applied here was not what a judge might think about Janson's testimony, but what a jury might think about it, if permitted, under proper instructions, to appraise Janson's testimony, attacked on the ground of his insanity, at the time of the event to which he testified, as well as at the time his testimony was given.

Petitioner at pages 65-6 of his main brief before the Appellate Court pointed out that there was not a single reference to Janson or his testimony in the trial court's charge.

The conclusion on this record is inescapable that the Judge made himself the trier of the facts and acted as a self-appointed substitute for the jury* (*People* v. *Ohanian*, 245 N. Y. 227, 233).

---

* See Frankfurter (now Mr. Justice Frankfurter), *The Case of Sacco and Vanzetti*, at page 103: "* * * Do the new facts raise debatable issues? Could another jury, conscious of its oath and conscientiously obedient to it, reach a verdict contrary to the one that was reached on a record wholly different from the present, in view of evidence recently discovered and not adducible by the defense at the time of the original trial?"

In *Smith* v. *Baldi*, 344 U. S. 561, Mr. Justice Frankfurter, whom Mr. Justice Black and Mr. Justice Douglas join, declared in a dissenting opinion (pp. 572-3):

> "But I am of the view that there is another reason, which in itself is for me conclusive, why this Court should not affirm the judgment below. It is that a new decisive factor, which was introduced for the first time here, requires reconsideration of the disposition below. After the case left the Court of Appeals it came to the knowledge of petitioner's counsel that the court-appointed expert, the professional witness on the issue of insanity on whose testimony the Pennsylvania courts relied, had himself been committed, as of January 12, 1952, because of an incurable mental disease which had deprived him of 'any judgment or insight'. This fact was brought to the notice of this Court in an affidavit not challenged by the respondent, which also averred that 'this intellectual deterioration was evidenced even on a clinical level in January, 1951'. The expert's report on Smith's sanity was made to the sentencing court on November 5, 1948. His disability was not known either to the District Court or the Court of Appeals in February and October, 1951, when they respectively ruled against the petitioner. Even uninformed judges may know that this kind of mental illness does not set in overnight but is the culmination of a long process. Indeed, the medical history, sketchy as it is, revealed by the affidavit filed here demonstrates the gradual manner in which the mental illness in question developed. The extent to which this affidavit vitiates the worth of the expert testimony taken by the sentencing court should not be made a matter of judicial notice. But to allow the victim of this testimony, which, in any event, has been brought into doubt, to go to his death without an opportunity for reassessment,

> by either State or federal court, of the basis for the rejection of his plea of insanity would constitute a denial of due process no less gross than if the sentence had been imposed without any hearing at all on the issue of sanity."

We would not touch further upon the subject, deeming it fully covered by the record and our main brief before the Appellate Court, if it were not for the constantly repeated assertion in the respondent's brief in the Court below that fear was the underlying basis for Janson's lies and the cause of his mental upheaval. The fact is that immediately after the suicide attempt on November 11th Janson told the Guard Captain and Warden at the City Prison that the reason he wanted to destroy himself was that he was depressed and worrying about his sick wife, was tired of living and wanted to end it (2018, 2013). Janson had been in difficulty with the courts years ago when he committed perjury. When he was admitted to Bellevue he said that he *"was not sure of the man who did the shooting"* and if he went to Court and said "it was the man I'll be in trouble again" (1943).

On admission to Pilgrim State Hospital *he said he did not see the shooting but identified the man in Court and then was not sure and that was the reason he attempted suicide* (1986). The findings of the Pilgrim State Hospital indicate that Janson had "more than tasted the flavor of alcohol (1992); that he had a paranoid predisposition and "the triad of alcohol, homosexual preoccupation and paranoid ideation were definitely present" (1993).

The fear that Janson claims he experienced was in no way chargeable to the defendant or any one connected with him. Whether the reason advanced by Janson for his lies and his attempts at suicide were honest or feigned it is difficult to say. For weeks prior to the attempted suicide on November 11th, Janson was psychotic. His

testimony upon the new trial hearing indicates this beyond question. During those weeks he was suffering from delusions, hallucinations and was awaiting an opportunity to destroy himself (3251-54; 3099-3108).

Who can understand the functioning of a disordered mind? Who can tell what motivates such a person in conduct and speech? Whatever the basic cause of the mental condition the fact of incompetency remains. This cannot be obscured by the emphasis placed by respondent upon its cause.

The mere statement of the claim that Janson was insane prior to November 11th, regained his sanity while a witness, and then became indisputably insane again almost immediately thereafter is its own refutation.

The facts known to the District Attorney the day before Janson took the witness stand dictated that a preliminary inquiry be conducted, perhaps in the absence of the jury, to determine Janson's competency. The Court apparently doubted Janson's competency when upon the trial he asked the witness whether he had ever been in a mental hospital or treated by a psychiatrist (482-484).

Again the fact is that defense counsel was not advised of the situation, no preliminary hearing upon the question of competency was held, and most important of all, no inkling was given to the jury of Janson's mental state so that his testimony might be evaluated in the light thereof. Both the District Attorney and the Trial Court seem to have lost sight of these vital considerations.

The Grand Jury Testimony After Conclusion of the Trial

Due process of law is coextensive with the entire trial from its beginning to its end. After the verdict was rendered, the trial court read to the jury, testimony given

to the Grand Jury by a witness (Basilio Paiutta) who had died before the trial (R. pp. 589-591). This was done apparently to ease the minds of the jurors as to whether they had "rendered a correct verdict" (R. p. 589). The jury had deliberated from 11:35 A.M. to 7:55 P.M. (R. pp. 578, 587). The trial court denied defendant's request that this Grand Jury testimony be excluded from the record (R. pp. 592-3). Upon the hearing for a new trial, a similar application to expunge this prejudicial, extraneous and improper matter was made and denied (R. pp. 984-987). Petitioner on the printed motion for reargument of the appeal contended that the trial court's ruling thereon was erroneous and violated petitioner's right to a fair trial (Memorandum supporting printed Motion, p. 9).

The Admission in Evidence of the Entire Grand Jury Minutes Upon the Motion for a New Trial

We have already referred to this phase of the case at page 14 of this petition and we do not think any further discussion of this point is necessary. Due process of law is certainly not observed if such unfair procedure is resorted to, for it stripped the accused of the presumption of innocence and precluded a proper determination of the motion for a new trial.

The Admission in Evidence of Inflammatory Newspaper Reports Upon the Motion for a New Trial

The trial court received in evidence, despite objection (R. p. 890) newspaper articles referring to the alleged killing of Basilio Paiutta, a Grand Jury witness on July 2, 1952 to which we have referred at page 14 of this petition. In sensational headlines and in the text of the newspaper reports it was set forth "WITNESS IN SLAYING FOUND RIDE VICTIM—DEATH LINKED TO TESTIMONY" (R. p. 1407,

N. Y. Evening Journal; "FIND KEY MURDER WITNESS GARROTED" (This clipping bore the petitioner's photograph and stated under his name: "Has Long Record—Chief Witness against him Killed" (R. p. 1409, Daily Mirror; and "KEY WITNESS IN GANG SLAYING STRANGLED, BODY LEFT IN STREET" (This clipping also contained petitioner's photograph, with the legend underneath his name: "Key witness against him slain" (R. p. 1411, Daily News).

There was not the slightest intimation of any kind during the course of any of the proceedings in the Courts below that the petitioner was in any way involved or implicated in the death of this Grand Jury witness, nor was there any evidence from which the inference could be drawn that such death had any relationship whatever to the petitioner's case. These newspaper reports should never have been received in evidence by the trial court and made part of the Record on Appeal. Fundamental principles of fair play were thereby violated and "fatally infected" the entire proceedings.

It is asking too much of any human being, regardless of his station in life, to obliterate such matters from one's mind. We cannot see how any impartial, unbiased judicial determination could have been made under those circumstances (See *Pennekamp* v. *Florida,* 328 U. S. 331, 357-366; *People* v. *Robinson,* 273 N. Y. 438, 446; *People* v. *Zackowitz,* 254 N. Y. 192, 198).

The inclusion of *ex parte* Grand Jury testimony and inflammatory and highly prejudicial newspaper reports into the record, upon the trial court's insistence, denied the petitioner every vestige of due process of law and the right to the court's dispassionate, unbiased judgment. (*Sheperd* v. *Florida,* 341 U. S. 50-55, per Jackson, J.)

In these circumstances, the petitioner did not have a fair chance to defend his life. The trial and the hearing on the application for a new trial were a mere sham and pre-

tense (*Moore* v. *Dempsey,* 261 U. S. 86, 91). Proceedings conducted in such manner by the trial judge were contrary to the basic principles repeatedly enunciated by this Court in many and diverse cases involving the violation of the Due Process clause of the Fourteenth Amendment (*Rochin* v. *California,* 342 U. S. 165).

The Trial Court's Charge

The contention that petitioner was deprived of his fundamental rights to a fair trial because of the total inadequacy and invalidity of the Court's charge is stated at page 16 of this petition, and will not be repeated here. We desire, however, respectfully to call this Court's attention to the declaration of Chief Judge Lehman, in *People* v. *Buchalter,* 289 N. Y. 181, 223:

> "The accused is entitled to demand that the issues of fact be submitted to the jury in a charge which correctly defines the questions upon which the jury is the arbiter and the rules of law which bind the jury and which is calculated to assist the jury in its deliberations. These are fundamental rights guaranteed by the Constitution and part of the freedom which this country is now desperately fighting to maintain. To the extent that the trial court errs either in its rulings or in its charge or fails to safeguard the rights of the accused to a fair trial or intrudes upon the field reserved to the jury and withdraws from the jury questions upon which the jury is the sole arbiter, the verdict of the jury is tainted and is not a conclusive finding of guilt".

In the *Buchalter* case, *supra,* this Court "granted certiorari in order that the petitioners' claims of denial of a federal right might be examined in the light of the record with the aid of briefs and oral argument" (*Buchalter* v. *New York,* 319 U. S. 427, 429).

Conclusion

At the time that petitioner voluntarily surrendered himself to answer the charge in the indictment (945)—and at no time thereafter—did the petitioner surrender the right to a fair trial protected by the Due Process Clause of the Fourteenth Amendment. We earnestly submit that it is plain from the record that petitioner's fundamental rights have been seriously violated here.

> "Due process of law, preserved for all by our Constitution, commands that no such practice as that disclosed by this record shall send any accused to his death." (*Chambers* v. *Florida*, 309 U. S. 227, 241.)

For these reasons, it is respectfully submitted that a writ of certiorari should be granted.

Dated: New York, June 7, 1954.

RUDOLPH STAND,
Counsel for Petitioner.

JACOB SHIENTAG,
Attorney for Petitioner.

AUG 2 19
HAROLD B. WILLEY

Supreme Court of the United States

October Term, 1954

No. 45 Misc.

LEONARD SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FRANK S. HOGAN
District Attorney
New York County

RICHARD G. DENZER
CHARLES W. MANNING
LEONARD E. REISMAN
Assistant District Attorneys
Of Counsel

807 BAR PRESS INC., 54 LAFAYETTE ST., NEW YORK 13 — WA. 5-3432-3.

INDEX

PAGE

STATEMENT 1

THE TRIAL 2

THE MOTION TO SET ASIDE THE VERDICT AND FOR A NEW TRIAL 4

A. As to the alleged insanity or incompetency of the witness Janson 4

1. The petitioner's evidence 5

2. The People's evidence 7

B. As to the alleged newly discovered evidence concerning the identity of the killer 9

QUESTIONS PRESENTED AND THE RESPONDENT'S POSITION 10

ARGUMENT — No federal questions were properly raised or are presented. And, in any event, there are no substantial federal questions 11

(1) As to the alleged insanity of the witness Janson 12

a. The question of deprivation of due process was not properly raised 12

b. There is no substantial federal question presented 13

(2) As to the allegedly improper receipt in evidence of the grand jury minutes on the motion for a new trial 15

PAGE

a. No federal question was raised or presented 15

b. There is no federal question involved..... 16

(3) As to the receipt in evidence, on the motion for a new trial, of the allegedly prejudicial newspaper clippings 18

a. No federal question was raised or is presented 19

b. There is no federal question 19

(4) As to the alleged inadequacy of the trial court's charge 20

a. No federal question was raised or is presented 20

b. There is no federal question 21

Supreme Court of the United States

October Term, 1954

No. 45 Misc.

LEONARD SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Statement

Petitioner was convicted of the crime of MURDER IN THE FIRST DEGREE (Penal Law §1044, subd. 1) by a judgment of the Court of General Sessions, New York County, rendered June 24, 1953, and was sentenced to death (4188-9).* Prior to sentence, the petitioner moved to set aside the verdict and for a new trial on the ground of newly discovered evidence. A hearing was held and the motion was denied with an opinion (4111-28).

The judgment of conviction, which included the order denying the motion for a new trial, was affirmed, without opinion, by the Court of Appeals (306 N. Y. 863[1]; motion

* References, unless otherwise indicated, are to folios of the printed record.

[1] The following statement accompanied the affirmance by the Court of Appeals: *"People, &c., res.* v. *Salemi, ap.*—Judgment of conviction affirmed. No opinion. All concur except Lewis, Ch. J., Desmond, and Van Voorhis, J. J., who dissent and vote for reversal and a new trial on the ground that the Court's charge did not 'marshal the evidence' as required by *People, &c.*, v. *Odell* (230 N. Y. 481)."

for reargument denied 306 N. Y. 946; motion to amend remittitur denied 306 N. Y. 946; motion for reargument denied 306 N. Y. 978).

The Trial

The petitioner was tried on an indictment for Murder in the First Degree which charged that, on or about February 26, 1952, with malice aforethought, he shot one Walter Forlenza with a pistol, causing his death the following day (7-9).

The evidence established that, in the early evening of February 26, 1952, Walter Forlenza was fatally shot by the petitioner as the deceased was sitting in a dining room in the rear of a bar and grill in New York City and County. The petitioner, who had apparently entered the tavern a few minutes before the crime, stood briefly at the bar in front of the establishment and then went back into the dining room to perpetrate the killing. After firing two shots into the deceased's head, he ran back through the bar room and made his escape, remaining unapprehended for about ten weeks.

Proof of the defendant's guilt came, in large part, from two witnesses who were present in the saloon when the crime occurred, each of whom knew the defendant by sight. One of these witnesses was Paul Janson, a patron of the bar for about seven years (295, 297). He testified that, on the day of the shooting, he was standing at the bar drinking beer and watching television when he noticed the petitioner alongside of him (298-301, 304, 351-3, 411-23, 516-8). About five minutes later, he heard two shots from

the dining room in the rear and turned to see the petitioner "leaning over a table looking at something" (305-6, 312-3, 353-4). Thereafter, the petitioner, who had been holding a gun, ran the full length of the establishment, passing Janson on the way and pocketing his gun as he left (316-8). Looking back into the dining room again, Janson saw a man (the deceased Forlenza) "topple off" a chair and fall to the floor (318-21). Janson himself then departed and went back to work (321).

The other witness who was present in the bar on the evening of the fatal shooting was a bartender and part owner of the establishment. He testified that he saw the petitioner and Janson standing next to each other at the bar and also observed the deceased seated at a table in the dining room (184-98). A few minutes later, while he was in the kitchen, he heard the shots and entered the dining room and observed the deceased falling from his chair to the floor (199-206).

In addition, there was evidence of a dying declaration made by the deceased about three and a half hours before his death, in which he declared that it was the petitioner who had shot him as a result of an argument (682-3, 683-4, 724-6). Finally, testimony was adduced to the effect that ten weeks of police investigation, commencing immediately after the shooting, had failed to locate the defendant (875-84, 894-7, 906, 939-43, 947).

As a defense to the charge, the petitioner advanced an alibi, which rested chiefly upon the testimony of two witnesses who placed him at or near a restaurant in another county at the time of the crime.

The Motion to Set Aside the Verdict and for a New Trial

Prior to sentence, the petitioner made a motion to set aside the verdict and for a new trial on the ground of newly discovered evidence, and a hearing was held on that motion. The motion had two distinct and unrelated phases: (1) that the witness Janson was incompetent at the time he testified; and (2) that new evidence had been discovered—three witnesses having been found after the petitioner's conviction who claimed to have information supporting his claim that he was innocent.

We treat below the motion for a new trial in each of its two phases separately.

A. As to the alleged insanity or incompetency of the witness Janson

The first phase was based upon information allegedly discovered by the defense after the verdict, that the People's witness Janson, who had identified the petitioner as the killer, had, while confined as a material witness in a prison during the trial, rammed his head into some iron bars in a suicide attempt two days before he took the stand. In addition, the day after the conclusion of the trial, Janson was committed for observation as to his mental condition, was diagnosed as being psychotic, and was thereafter sent to a state hospital for treatment (1936-41, 1952, 1954). On the basis of these facts, the petitioner contended that Janson was insane at the time of his testimony and, hence, incompetent as a witness (1801-5).

1. The petitioner's evidence

Dr. Leonard Cammer, a psychiatrist, prepared an affidavit in which he stated that he had read Janson's trial testimony, which he found to be "contradictory" in nature, and had examined abstracts of the records of the hospitals (wherein Janson had been examined and treated) relating to his background history, including his attempt to commit suicide while confined as a material witness (1875 *et seq.;* see Exhs. B, C, on motion). Based upon the foregoing material and information, Dr. Cammer concluded that Jansen "was in an abnormal state of mind at the time he testified," and that he was "not competent to testify in Court on any matter on November 13th and November 14th, 1952" (1889-93; also 2164-5).

At the hearing on the motion, Dr. Cammer acknowledged that he had never personally examined Janson, and, in fact, had never even seen him (2040, 2163-4). His opinion as to his mental condition was based solely on the material to which he referred in his affidavit (2039-43, 2164-5). Almost all of the information contained in the hospital records was, of course, the result of interviews with Janson when he was concededly psychotic (2094-5).

According to the witness, persons who attempt suicide usually do so to expiate guilt feelings, which Janson had, although the desire for self-destruction could result from excessive fear (2080-1, 2084, 2119-20, 2132). The doctor acknowledged that Janson, who knew that another eye witness in the case had been strangled, might have had much to fear and that such would be a normal reaction (2111-4). However, in Janson's case, the psychiatrist said,

that would have been merely a contributory factor and his mental condition stemmed principally from his own personality development and paranoid delusions, which pointed to a "disturbance that existed long before he ever set foot in the bar and grill" (2091-3, 2097-8, 2161-3).

Dr. Cammer stated that a psychotic person might, "By coincidence," tell the truth (2119, 2128, 2140) but that Janson's testimony, including his identification of the petitioner, could not be "reliable" (2128-9, 2140), and that he was "incapable" of telling the objective truth at the time he testified (2130-2, 2180-1), even though his account might have actually been in accord with the objective facts (2130-1).

Various detectives who had been assigned to guard Janson before and during the trial testified as to his behavior while a material witness in a local hotel. Indicating that at first he was "all right" (Whelan 2309) and that, on one occasion, he went to a bowling alley and helped keep score while the officers bowled (Healy 2284-6, 2291-8; also Janson 3163-6), they stated that, about November 18th or 19th (after he had testified at the trial), he began to slacken off on his eating and smoking (Mengrone 2232, 2239-41, 2243-4, 2257-8; Whelan 2309-10). When he finally refused food, he was taken to the District Attorney's Office on November 21, 1952, examined by Dr. Lichtenstein, a psychiatrist employed by that Office, and sent to a hospital (Mengrone 2232, 2235, 2238-41, 2258-62; Whelan 2309-12).

Finally, the petitioner's trial counsel—an attorney with twenty-four years experience in practicing criminal law

(2887)—testified that he recalled Janson stating at the trial that he had deliberately rammed his head into some bars and that he had said that he "blew * * * [his] top." (see 326, 480-4, 623-4; 2869-77). Although indicating that he had no idea this was a suicide attempt, the attorney reopened the subject the following day when Janson resumed the witness stand and questioned him as to whether he had ever been treated by a psychiatrist or been confined in a mental institution (480-4, 623-4, 2869-77).

Saying that he had been misled by the court's questioning on the subject and by Janson's replies on the stand, counsel stated that he did not learn that Janson's action was a suicide attempt until some months later when he was shown the hospital records and the official report of the incident (2874-7, 2893-4, 2897-8, 2934-5, 2938-9). He conceded, however, that, after hearing Janson testify concerning the self-inflicted injuries, he made no effort to obtain the jail records nor had he communicated with anyone at the jail in order to find out precisely what had happened (2887-92, 2903-4, 2940).

2. The People's evidence

Paul Janson testified that, after another witness in the case, a bartender, had been found strangled, he had been committed as a material witness and had been "only too glad" that it was done (2962-6). As the trial date approached, Janson, owing to his knowledge of the bartender's fate, was obsessed by "fear and terror" of retaliation if he appeared as a witness and identified the petitioner, and he began to get edgy and nervous (2968, 2971, 3001-2, 3098-100, 3386). Finally, shortly before he was to

testify, he rammed his head into some bars at the jail in an attempt to kill or injure himself so that he could not be called as a witness (see 326, 480-4; 2967-72, 3001, 3037-9, 3109). When the attempt failed, he "snapped out of it" and decided that he "would do as I said I was going to do, tell the truth and nothing but the truth" (3147).

Janson recalled testifying at the trial, and stated that his answers there were truthful (2973-8). He reiterated his previous trial testimony identifying the petitioner as the man he had seen in the bar and grill with a gun in his hand (2975-8, 2981-2, 3006, 3110-3, 3119-20).

Janson again acknowledged—as he had at the trial (626-44)—that he had concealed his knowledge of the identity of the killer until July 23, 1952, when, after talking with his wife and daughter, he finally told the whole truth and picked out a picture of the petitioner (3002-6, 3047-58, 3117). His secretiveness up to that time resulted from fear of injury or murder of himself or some member of his family (3061-2, 3383-4). His fear increased after he identified the petitioner as the killer (3384-6). Indeed, he still was fearful of his safety and was still under police guard (3071-3, 3097, 3394).

Dr. Perry M. Lichtenstein, a psychiatrist attached to the District Attorney's Office, testified that, on November 21, 1952—after the trial—he had examined the witness Janson and concluded that he was at that time psychotic and in need of psychiatric care, although he could not then tell how long Janson had been in that condition (3427-8, 3431-4, 3456, 3524-5, 3534-5, 3546-67). As a result, he wrote a letter to Bellevue Hospital requesting his admission to the Psychiatric Division (3433, 3544-5).

The psychiatrist further testified that he thereafter read Janson's trial testimony and found his answers responsive, relevant and coherent, and nothing to indicate that the witness had behaved in any unusual manner (3434, 3437). The doctor's opinion, based in part on this testimony, was that at the time he testified, Janson was not psychotic or insane, but rather was in contact with reality (3435-43, 3456-7, 3763-5).

Dr. Lichenstein's diagnosis of Janson's mental condition on November 21st was that he was suffering from a "reactive depression of an involutional type" occurring at a certain time of life when Janson was under "great stress and strain," which could have been brought on as a result of fear (3454-6, 3704-7). However, he believed that this psychosis did not manifest itself during Janson's trial testimony (3456-7).

The psychiatrist disagreed with Dr. Cammer's opinion that Janson was psychotic when he testified and with his explanation of Janson's motivations, stating that Dr. Cammer's theory was "inconceivable" under the circumstances (3459-62, 3921-2).

B. As to the alleged newly discovered evidence concerning the identity of the killer

This phase of the motion revolved about the affidavits and testimony of three persons who were allegedly in the bar and grill on the night of the crime, two of whom testified they had observed the shooting and that the defendant was not the killer (Russo 1907-11; Cusimano 2721-2, 2775-8, 2797).

No purpose would be served in recounting the testimony of these two witnesses in detail (see *infra,* pp. 18-19). Suffice it to state that they testified that they did not come forward for fear of "reprisals," although they never identified the killer, and that they decided to make themselves available as witnesses as a result of a chance meeting with the petitioner's brother in December, 1952, some ten months after the killing and five months after the arrest of the petitioner (Russo 1911-3, 2519-20, 2554-6, 2582-3; Cusimano 2816-9).

Questions Presented and the Respondent's Position

The petitioner contends that he was deprived of due process of law in four major particulars (brief, pp. 6-7):

(1) That the trial court received in evidence against him the testimony of an allegedly insane and incompetent witness; and that the court erroneously denied his motion for a new trial after hearing evidence on the subject of the witness' mental condition;

(2) That, on the motion for a new trial, the trial court erroneously received in evidence the testimony of witnesses before the grand jury;

(3) That, on the motion for a new trial, the trial court erroneously received in evidence certain allegedly prejudicial newspaper articles; and

(4) That, on the trial, the trial court erred in failing to marshal the evidence in the case.

The respondent's position is that, in each of the above particulars, no federal question was timely raised or properly presented, that no claim of deprivation of due process was made until motion for reargument of the appeal after affirmance of the judgment by the New York Court of Appeals, and that, in any event, no substantial federal question is involved.

ARGUMENT

No federal questions were properly raised or are presented. And, in any event, there are no substantial federal questions [answering the petitioner's brief, pp. 13-25].

It is well established that this Court does not have, and will not assume, jurisdiction to review a judgment of the highest court of a state where the alleged federal question has not properly been raised, presented and passed upon in the state court. A federal question is not properly raised for the first time upon a motion for reargument in the state court. Nor is a federal question deemed to have been passed upon where the state court delivers no opinion, unless it is clear that the court actually entertained and passed upon such question, or that such was necessary to its decision [see *Stembridge* v. *Georgia* (1951) 343 U. S. 541, 546-548; *Herndon* v. *Georgia* (1934) 295 U. S. 441, 443; *Waters-Pierce Oil Co.* v. *Texas* (1908) 212 U. S. 112, 118; *McCorquodale* v. *Texas* (1908) 211 U. S. 432, 437; *Thomas* v. *Iowa* (1907) 209 U. S. 258, 262-263]. It is likewise well settled that the due process clause of the Fourteenth Amendment does not enable this Court to review mere

errors of state law [*Buchalter* v. *New York* (1942) 319 U. S. 427, 430, 431; and cases cited in footnote 6, p. 430]. Bearing these settled principles in mind, it is manifest that the instant petition for certiorari must be denied.

(1) *As to the alleged insanity of the witness Janson*

a. The question of deprivation of due process was not properly raised.

The defendant alleges that he was deprived of due process of law by reason of the trial court's receiving in evidence against him the testimony of the "insane witness Janson" (Petition, pp. 6, 13). To begin with, there is no definitive proof that Janson was, in fact, insane at the time he testified at the trial, something which the petitioner now assumes to be established; the psychiatric testimony given on the motion for the new trial was in conflict on the subject; and the trial court, on the basis of all the evidence submitted on the motion for the new trial, found that Janson was not insane or incompetent at the time he testified, a determination which rested squarely within its discretionary powers [see *People* v. *Sprague* (1916) 217 N. Y. 373, 380; *People* v. *Patrick* (1905) 182 N. Y. 131, 177-178, rearg. den. 183 N. Y. 52; *People* v. *Koepping* (1904) 178 N. Y. 247, 253; *People* v. *Buchanan* (1895) 145 N. Y. 1, 30-32]. Be that as it may, no question is raised for review in this Court.

In contending that the point was raised in the trial and appellate courts and preserved for review here, the petitioner alludes to a certain passage in the affidavit of his counsel on the motion for a new trial, and to the fact that the alleged deprivation of due process was urged on

his motions in the Court of Appeals for reargument of the appeal and amendment of the remittitur (Petition, p. 13).

The passage referred to in the affidavit is couched in the most "vague and inferential" terms, and is manifestly insufficient to raise any question involving due process [see *Thomas* v. *Iowa, supra,* 209 U. S. 258, 262-263]. Even more significant, however, is the fact that, upon appeal to the Court of Appeals, while the issue of Janson's mental condition was raised as an argument for reversal and for the granting of a new trial, there was no mention—much less a claim—made by the petitioner that he had been deprived of due process of law.

In short, it was not until after judgment was rendered in the Court of Appeals that the petitioner advanced his present claim. As this Court has frequently ruled, this is too late to warrant this Court in assuming jurisdiction, particularly since the Court of Appeals obviously decided the case upon state grounds in the first instance; denied, without opinion, the petitioner's motion for reargument of the appeal on the grounds here urged; and specifically rejected the petitioner's application to amend its remittitur to recite that federal questions had been presented or passed upon, or were in any way involved in its decision.

b. There is no substantial federal question presented.

Apart from the aforementioned jurisdictional defects, there is no basis for issuance of the writ.

As previously indicated in this brief (*supra,* pp. 7 and 8), the witness Janson testified at the trial, under cross-examination, that he had "deliberately" and "purposely"

rammed his head into some bars at the prison where he was being detained. The petitioner's counsel had every opportunity to explore this incident to the fullest extent, but avoided pursuing the matter—obviously, we submit, for the patent reasons that to do so might have reacted most unfavorably to his client.

At this point in the trial, apart from the suicide attempt itself, there was nothing to indicate that Janson was mentally abnormal in any way. He was completely oriented, and his testimony was clear and coherent. It was not until after he had testified that he began to behave in an unusual manner, and not until after the jury verdict was rendered that he was determined to be psychotic. Prior to judgment, the defense was informed of this development, and judgment was postponed pending Janson's recovery to allow the defense to take whatever steps they chose in the light of these events.

The motion for a new trial resulted and a full-scale hearing was held, which lasted much longer than the actual trial. Far from being denied due process, the petitioner was accorded it in every sense of the term.

The petitioner's claim of a denial of due process is based upon the assumption that Janson was—both in fact and law—insane and incompetent at the time he testified at the trial, and that the jury was not permitted to pass upon the question of his mental condition or competency. This overlooks the salient fact that no question of his competency was raised and that, had there been, there would have been nothing for the jury to consider except that Janson had deliberately inflicted injury upon himself,

which—regardless of what the petitioner may say as to his knowledge of the true nature of Janson's actions—any reasonable person would recognize as a suicide attempt. None of the evidence to which the petitioner refers in his brief could have been presented, such as the testimony of his expert witness at the new trial hearing, which was based in the main on the hospital records subsequently compiled while Janson was concededly insane, and the hospital entries themselves, which the petitioner presently stresses (Petition, pp. 10-12, 20-21).

There can, therefore, be no question of denial of due process at the trial and, accordingly, any such claim must be predicated on what occurred on the motion for a new trial. That, as seen, was conducted in the fullest manner possible, and was heard and decided in accordance with proper state procedure, which was reviewed and affirmed by the Court of Appeals. Indeed, even the dissenting judges of that court did not indicate that the denial of the petitioner's motion for a new trial was improper.

For the above reasons, we submit that no substantial federal question is presented with respect to this contention.

(2) *As to the allegedly improper receipt in evidence of the grand jury minutes on the motion for a new trial*

a. No federal question was raised or presented.

On the motion for a new trial, the entire grand jury minutes were received in evidence (2942-61; R. pp. 1412 *et seq.*). At the conclusion of the trial itself, after the

verdict, the trial court, in response to a query from one of the jurors, had had the grand jury testimony of one Basilio Pauitta, the deceased bartender at the Belvedere Bar & Grill, read into the record (1765-72). Pauitta, who had named the petitioner as the killer in his grand jury testimony, had been found strangled about two weeks after he had testified (1771-2; R. p. 1412).

While objection was made to Pauitta's grand jury evidence being made part of the record (1776-7) and, on the motion for a new trial, to a portion of the balance of the grand jury minutes being received in evidence (2942-61), no claim was made that this constituted a violation of due process.

Moreover, on the appeal to the Court of Appeals, the matter was not even mentioned in the petitioner's main brief.

It was not until the petitioner moved for reargument of the appeal or, in the alternative, for amendment of the remittitur, that he claimed—for the first time—that the making of the grand jury testimony a part of the record constituted a violation of due process.

Clearly, any such federal question—if, indeed, it is—was not properly or timely made so as to give this Court jurisdiction to review.

b. There is no federal question involved.

As we have pointed out, the grand jury testimony of Pauitta—as well as the balance of the grand jury minutes—was not before the trial jury prior to verdict. Accord-

ingly, there can be no possible federal question of a violation of due process upon the trial of the petitioner on the issue of his guilt or innocence, as determined by the trial jury.

Nor does such a question arise by reason of making the grand jury minutes a part of the record on the motion for a new trial. Examination of the grand jury minutes—and comparison thereof with the trial record—reveals nothing prejudicial in any way to the petitioner. The grand jury witnesses—apart from Pauitta—who did not testify at the trial, gave no testimony implicating the petitioner in the crime.

Pauitta's grand jury testimony, as we have said, was not made known to the trial jury until after verdict, and, accordingly, could not have influenced their deliberations in any way. Although he does not say so, the petitioner evidently feels that the testimony prejudiced him in the eyes of judges of the Court of Appeals. Apart from that being most unlikely, it seems especially significant that the petitioner did not even raise the point on the original appeal, which indicates that he did not then deem it prejudicial. Raising it for the first time on the motion for reargument strongly suggests that the petitioner is belatedly grasping at straws having no real substance. Certainly, no federal question of due process is raised by the record.

(3) *As to the receipt in evidence, on the motion for a new trial, of the allegedly prejudicial newspaper clippings*

On the motion for a new trial, the petitioner produced three witnesses, whose testimony was supposedly "newly discovered", to testify that he was not the killer. One of these, George Russo, filed an affidavit stating that he had been at the bar on the night of the shooting, that he knew the petitioner, and that the petitioner was not the man who had done the shooting (1900-14). Russo also claimed that he had not come forward with his evidence until after the petitioner's conviction because he had not known of the petitioner's indictment and trial and, while he had known of the petitioner's involvement in the case by reason of reading newspaper articles in early July, 1952, had believed that the petitioner's arrest was not of any consequence (1911-4).

Called as a witness on the hearing of the motion for a new trial, Russo was cross-examined about the newspaper articles that he had read relating to the violent death of the bartender witness, Pauitta, which, he claimed, was the first indication he had had that the petitioner was in any way involved in the case (2443-7, 2497-8, 2503, 2526-32, 2538-9). Inquiry was made as to why, after seeing these articles, he had not then made known that the petitioner was innocent of wrongdoing (2499-502, 2509-18, 2540-4). The three articles—which he acknowledged having seen and read (2532-8, 2569-71)—were marked in evidence (2664-9; Exhs. 2, 3, 4, on motion) and the petitioner now contends that the receipt of these as exhibits was prejudicial and violated his fundamental rights.

a. No federal question was raised or is presented.

The propriety of Russo's cross-examination with respect to the newspaper articles was never questioned. Indeed, the marking of them in evidence, upon his redirect testimony, was not seriously contested (2664-9), and only upon the ground that Russo had said he had read but one of them (2668-9; but see 2532-8, 2569-71). No claim whatever was made that the reception in evidence of the articles violated any of the petitioner's constitutional rights.

So insignificant, in fact, were these articles—which, incidentally, were not before the trial jury—that the petitioner made no claim in the appellate court that he was at all prejudiced by their reception, much less that a deprivation of a fundamental federal right was involved. At the risk of being overly repetitious we again note that only after affirmance of the judgment by the Court of Appeals did the petitioner, on motion for reargument, tardily claim that his constitutional rights were infringed. This, as we have pointed out, comes too late to raise a federal question of which this Court will take cognizance.

b. There is no federal question.

Quite apart from the above, there is no federal question of due process. It was perfectly proper—as indicated by the absence of even so much as an objection—to cross-examine Russo concerning his knowledge, as of early July, 1952, of the petitioner's involvement in the crime of which Russo was seeking rather late in the game to absolve him. If, as Russo asserted, he knew in February, 1952, that the petitioner was not the killer, then it became manifestly

important to determine why, after learning in July that the petitioner was being held for the crime, he, Russo, did not then come forward with his exculpatory information. Contrary to Russo's claim that he believed that the petitioner was merely being held on suspicion, the newspaper articles served to show that Russo must have known that the petitioner had actually been indicted and charged with the killing. Therefore, reception of the articles in evidence on the motion for a new trial was clearly proper and correct.

(4) *As to the alleged inadequacy of the trial court's charge*

The petitioner contends that the trial court failed to review the evidence in charging the jury and that he was thereby deprived of his fundamental rights without due process of law.

a. No federal question was raised or is presented.

There was no exception taken to the Court's charge on the ground that the evidence had not been fully reviewed. Although it was argued on the appeal to the Court of Appeals that the charge was inadequate and erroneous in this respect, no claim was made that a violation of due process resulted. That claim was first advanced on the motion for a reargument of the appeal which, as seen, comes too late to raise a federal question.

b. There is no federal question.

Even assuming that timely objection had been made in the State courts, there is no federal question for review here. In the very case from which the petitioner quotes (brief, p. 24)—*People* v. *Buchalter* (1942) 289 N. Y. 181, 223—to support his claim that he was deprived of a fundamental right, the Court of Appeals affirmed the judgment, and this Court, in affirming the action of the Court of Appeals [*Buchalter* v. *New York* (1942) 319 U. S. 427, at page 431], stated that

> "* * * the due process clause of the Fourteenth Amendment does not enable us to review errors of state law however material under that law. We are unable to find that the rulings and instructions under attack constituted more than errors as to state law. We cannot say that they were such as to deprive the petitioners of a trial according to the accepted course of legal proceedings."

Accordingly, no federal question is presented.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

RICHARD G. DENZER
CHARLES W. MANNING
LEONARD E. REISMAN
Assistant District Attorneys
Of Counsel

July, 1954

FILED
AUG 26 1954
HAROLD B. WILLEY, Clerk

Supreme Court of the United States

OCTOBER TERM, 1954

No. 45 Misc.

LEONARDO SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

RUDOLPH STAND,
Counsel for Petitioner,
Office & P. O. Address,
80 Broad Street,
New York 4, N. Y.

JACOB SHIENTAG,
Attorney for Petitioner.

INDEX

	PAGE
Regarding the Question of Jurisdiction	1
I. As to the Insane Witness, Paul Janson	2
II. As to Admission in Evidence of the Entire Grand Jury Minutes on the Hearing for a New Trial	9
III. As to the Admission in Evidence of Prejudicial Newspaper Articles	10
IV. As to Inadequacy and Invalidity of the Trial Court's Charge	12
V. As to the Cases Cited by Respondent	12
Conclusion	14

Table of Cases Cited

Alford v. United States, 282 U. S. 687	7
Berger v. United States, 295 U. S. 78	8
Buchalter v. New York, 319 U. S. 427	1, 12, 13, 14
District of Columbia v. Armes, 107 U. S. 519	6
Mooney v. Holohan, 294 U. S. 103	8
New York ex rel. Bryant v. Zimmerman, 278 U. S. 63	13
People v. Davis, 52 Mich. 569	8
People v. Odell, 230 N. Y. 481	12
People v. Zackowitz, 254 N. Y. 192	11
Shepherd v. Florida, 341 U. S. 50	11
United States v. Atkinson, 297 U. S. 157	10
Williams v. Kaiser, 323 U. S. 471	9

Other Authorities Cited

Report on Lawlessness In Law Enforcement (1931)	8
Wigmore, Evidence, Vol. 1, Sec. 194	12

Supreme Court of the United States

OCTOBER TERM, 1954

No. 45 Misc.

LEONARDO SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITIONER'S REPLY BRIEF

Although most, if not all, of the matters contained in respondent's brief have already been covered in the Petition, certain statements or arguments advanced by respondent in the brief in opposition call for reply.

Regarding the question of jurisdiction.

The grounds upon which the jurisdiction of this Court is invoked and the cases cited to sustain its jurisdiction are set forth in the Petition and will not be repeated here.

It is noteworthy that the respondent does not even attempt to discuss or undertake to distinguish or explain away the numerous authorities cited in support of the Petition. Instead, these cases—with a single exception—are wholly ignored by the respondent.* No effort seems to have been made to meet our contentions except with stereotyped generalities.

* The *Buchalter* case cited in the Petition (p. 24) is the one and only case which challenged respondent's consideration at all (Respt's Br., pp. 12, 21). We will later make further reference to this case.

As more particularly set forth in the Petition, the federal questions sought to be reviewed herein were properly raised and present substantial questions under the Due Process Clause of the Fourteenth Amendment.

I.

As to the insane witness, Paul Janson.

Respondent's statement at page 10, wherein he undertakes to set forth petitioner's contentions under subdivision (1) of "Questions Presented," regarding the insane witness, Paul Janson, and assumes that the proposition stated by him is that asserted by the petitioner, is an incomplete generalization which requires correction.

This statement avoids reference to one of the essential parts of petitioner's contentions, namely, that the trial court received in evidence against the petitioner, the testimony of the said incompetent and insane witness, *"which fact was known to the prosecutor, but undisclosed to the defense and not divulged to the jury"* (Petition, p. 6).

Janson's entire testimony upon the trial must be examined to experience the full impact of his unreliability and mental confusion. It is an utter impossibility to compress this testimony within limits reasonable for a Petition, except by a statement of the barest outline. The petitioner's claim of a denial of a federal right on this point can be presented adequately only in a more extended argument in the brief on the merits, if certiorari be granted by this Court, in the exercise of its discretion.

Nothing in respondent's brief on this application overcomes the fact that the District Attorney was possessed of knowledge concerning the insane and incompetent witness Janson, which was not disclosed to the defense and not revealed to the jury.

Respondent asserts at page 15 that "regardless of what the petitioner may say as to his knowledge of the true

nature of Janson's actions, any reasonable person would recognize as a suicide attempt."

The record shows that when Janson appeared in the courtroom on November 13, 1952, with a bandaged head, not a single question was asked on direct examination as to the reason for the bandage although obviously the man had been injured (280-321). On cross examination, defendant's attorney called attention to Janson's appearance and the Court asked how it happened. The answer was "I ran into some bars" (326).

For a short while it seemed that this was just an accident resulting from failure to notice the bars. When he stated that he did see them, he was asked by the Court to tell the time on the clock in the rear of the courtroom. Janson said it was 3:37 when in fact it was 3:27 (329). When the day's session ended, the court ordered Janson placed in the custody of the police instead of sending him back to the Bronx County jail or releasing him (395).

The following day, November 14th, when Janson resumed the witness stand, he was asked whether he had discussed the case with anyone the previous day. His answer was:

> "I dropped—was asked questions. I always answered them the wrong way" (479-480).

When the cross examination had been concluded a definite impression was left behind that Janson's injury resulted from a momentary excitement or anger induced by some undisclosed external cause (482-4; 2869-2874; 2892-2898) and was not motivated by any suicidal design. In the respondent's brief at page 7, it is erroneously stated that defendant's attorney asked Janson whether he had ever been treated by a psychiatrist or been confined in a mental institution. These questions were put by the Court (482-4; 2893-2898).

Upon the hearing for a new trial, the police officer (Detective Mengrone) in charge of the case testified as a defense witness (2214 *et seq.*). On the morning of No-

vember 12th, the day the case began, the officer brought Janson from the jail to the District Attorney's office where he was kept all day. Janson's head was bandaged. The officer learned that Janson had attempted suicide at the prison the day before and he so advised Assistant District Attorney Dermody in charge of the case (2266-7).

When Janson was asked, on the hearing for a new trial, why he testified upon the trial that he did not know the reason he banged his head against the bars after having told the Warden and Captain of the prison that his purpose was to destroy himself, his answer was "I was befuddled, I guess" (3367-8). This was immediately retracted by his admission that the real, honest reason was because he did not want the Court and jury to know that he attempted suicide (3369).

The only impression—contrary to the assertion of respondent at page 15—that any reasonable person could possibly get from Janson's trial testimony was that something had occurred in the prison that got Janson excited. No possible inference could have been drawn by the defendant or his counsel or the jury that the injuries resulted from a determined inner compulsion to destroy life. The true facts, however, were known to the District Attorney and withheld from the defense.

After Janson concluded his testimony and was placed in police custody, he was maintained at a hotel under day and night guard and kept *incommunicado* (2224-2236). His whereabouts were not even disclosed to his wife and no medical attention was afforded him except to have his head dressed (2232-3). His mental condition deteriorated rapidly. He was in despair; his head was bothering him (3247-8). He stopped eating, smoking and talking and just stared at the walls of his room (2232, 2241). He imagined he saw things moving around at night (3283). He could not eat, felt depressed, run down and nervous and did not care what happened to him (3283, 3162). "I was starting to fall apart in other words" (3165).

The police advised the District Attorney of Janson's condition (2241, 2311). *This was during the time that the trial was still in progress, but none of this information was revealed to the defense by the District Attorney* (2243).

It only came to light after defense counsel ascertained from entirely different sources that Janson had been committed as an insane person to Bellevue Hospital at the instigation of the District Attorney's physician the day after the verdict was rendered.

Janson was psychotic prior to the commencement of the trial, during its progress and was committed only after the trial was ended.

Janson's condition was one that started from a series of events in early life and culminated in a dramatic exhibition of disturbed behavior by attempting suicide (2155-6). It is a continuous process that does not stop for a while and then repeats itself. It is not an episodic disease which turns on and off as a water faucet (2181).

The present attempt (Respt's Brief, pp. 8, 12) to minimize Janson's mental condition finds no support in medicine or common sense. Clinical experience indicates that Janson was psychotic on November 11, 1952, when he attempted suicide and that the psychosis continued at least from that date to November 21st when concededly he was insane (2180-1). The official records of his mental derangement evidenced by the reports from the City Prison, Bellevue and Pilgrim State Hospitals present the typical case of an involutional psychotic which expressed itself definitely on November 11th and worsened thereafter. A personal examination of the patient—who was found in the case records of the hospitals to be hallucinatory, delusional and paranoid—was unnecessary (2181, 2208). Such a person who exhibits the disturbed patterns of thinking, acting and feeling as manifested by Janson is untrustworthy for all purposes (2209). Particularly is this true when he is the only identifying witness and his testimony is relied upon to deprive another human being of life.

Respondent's present contention (p. 12) "that there is no definitive proof, that Janson was, in fact, insane at the time he testified at the trial", flies in the face of the facts which were adduced by the defendant for the first time upon the motion for a new trial.

The important factor, which respondent carefully refrains discussing or explaining, is the failure by the District Attorney to advise the defense of Janson's condition which had been made known to him. And still more important was the failure to have the facts revealed to the jury so that Janson's testimony might be properly appraised in the light of his mental condition (*District of Columbia* v. *Armes,* 107 U. S. 519).

What the District Attorney did the day after the case ended—having Janson examined and placed in Bellevue Hospital, Psychiatric Ward—should have been done before permitting him to testify, or at least while the case was still in progress and Janson's disturbed mental condition became increasingly worse. In any event, every concept of fair play dictated that the facts be disclosed to the defense by the prosecutor.

The respondent asserts at p. 14 that "*prior to judgment*" the defense was informed of the Janson "development". This statement is ambiguous and equivocal. The information as to Janson's attempted suicide and mental condition was derived from independent sources following Janson's commitment to Bellevue Hospital the day after the jury's verdict. The complete facts as to Janson were not known to the defense until February, 1953, when the hospital records were made available to the defense (2874-2884; 2900-4). The jury's verdict was rendered November 20, 1952 (16; 1761). Judgment of death was not pronounced until June 24, 1953 (4129-31; 4188-90).

Even respondent's own expert conceded that after suicide is attempted, a psychiatric examination should be made of the person as soon as possible, and that it is the proper thing to do (3541-2).

Concededly Janson was insane on November 21st (3432). Respondent's expert would not or could not say how long Janson had been suffering from this condition (3434), but he conceded that the insanity was present some time prior to November 21st when he first examined him (3810). This expert also conceded that Janson was then in such a mental condition that it would have been improper to call him as a witness for any purpose and, if so called, that the Court and jury should have been made aware of the condition (3534-6).

As to the denial of due process on this feature of the case.

The jury—sitting in judgment in a case involving a human life—were entitled to the whole truth. We again stress the point that Janson was the sole identifying witness against the accused. His testimony was the only vital testimony in the whole case and his credibility was of prime importance. By reason of the conduct of the prosecutor in failing to divulge the facts known to him surrounding Janson's suicide attempt, an unfair advantage was taken of the accused since defense counsel was blocked in revealing matters to the jury tending to discredit Janson's testimony which were discovered subsequent to the trial, resulting in grave prejudice to the defendant. It is as much the duty of a prosecutor to see that an accused on trial is not deprived of any of his constitutional rights as it is to prosecute him for the crime with which he may be charged.

In *Alford* v. *United States,* 282 U. S. 687, 692, Mr. Justice STONE, delivering the unanimous opinion for reversal said:

> "Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them."

The District Attorney is a quasi judicial officer, and was duty bound to disclose these vital facts even though such

suppressed evidence might weaken—if not destroy—the case for the prosecution.

In its Report on Lawlessness in Law Enforcement (1931), Vol. IV, the National Committee on Law Observance and Enforcement, declared at page 286, on the subject of Unfairness in Prosecutions:

> "High standards have been set for a prosecutor by the bench and the bar. Unlike the counsel for the defense, he is not solely an advocate for his client. He presents the case for the State, and yet he is to possess, in some measure, the impartiality of the judge."

The duties and obligations of a United States Attorney, applicable to all public prosecutors, were defined in the frequently cited case of *Berger* v. *United States,* 295 U. S. 78, 88; 55 S. Ct. 629, 633.

In the striking language of Cooley, C. J., in *People* v. *Davis,* 52 Mich. 569:

> "The State has no interest in interposing any obstacles to the disclosure of the facts, unless it is interested in convicting accused parties on the testimony of untrustworthy persons.
>
> "* * * If there shall be in the possession of any of its [the State's] officers information that can legitimately tend to overthrow the case made for the prosecution, or to show that it is unworthy of credence, the defense should be given the benefit of it."

The action of prosecuting officers on behalf of the State may constitute state action within the purview of the Due Process Clause of the Fourteenth Amendment (*Mooney* v. *Holohan,* 294 U. S. 103, 112, 113, 55 S. Ct. 340).

Respondent refers at page 2 to petitioner's alleged flight, but studiously refrains from mentioning the fact that the petitioner *voluntarily surrendered* himself in the District Attorney's office on May 14, 1952 (934; 945).

In our Petition, we have endeavored to set forth a concise statement of the case containing all that is material to the consideration of the Federal questions presented herein. Respondent's factual presentation calls for correction in many respects, but it would unduly prolong this reply to enter upon an extended analysis thereof, which would be more appropriate and permissible in the brief on the merits and on oral argument should this Court grant certiorari.

In the light of the record, the suggestion advanced by respondent at page 13 that this case was "obviously decided" upon state grounds is untenable. Without Janson's testimony there was no case whatever against the defendant. We therefore submit that there is no adequate nonfederal ground in support of the state court judgment. Under these circumstances, "it will be presumed that the state court based its judgment on the law raising the Federal question, and this court will then take jurisdiction". (*Williams* v. *Kaiser,* 323 U. S. 471, 478).

II.

As to admission in evidence of the entire Grand Jury minutes on the hearing for a new trial.

We believe that we have sufficiently covered this point in the Petition and little need be said in reply. The respondent's brief in opposition does not, we submit, meet the contentions made that the admission in evidence of the entire Grand Jury minutes—on the hearing for a new trial—of witnesses who had not testified at the trial; who did not confront the defendant; and who were not subject to cross-examination, deprived the whole course of proceedings resulting in the death sentence of the defendant, of the fundamental essentials of due process guaranteed by the Federal constitution.

Respondent states at page 17—referring to the Grand Jury testimony of the deceased witness Paiutta read into the record, over the protest of defense (1765-1772; 1776-

7)—that "although he does not say so, the petitioner evidently feels that the testimony prejudiced him in the eyes of judges of the Court of Appeals".

Here is what the petitioner himself said, among other things, on the day he was sentenced to death, after the so-called "full-scale hearing" was held:

> "* * * And the Court's own prejudicial attitude, in my opinion, made this fact so obvious it just couldn't wait to tell the jurors all about Paiutta's death, thereby maneuvering it into the record, for no apparent reason other than to hurt my chances for appeal as well as to show justification of its attitude throughout my trial" (4177-8).

All efforts to expunge this highly prejudicial matter were rebuffed by the trial court (1776-7) and on the motion for a new trial (2946-2960). This was an indefensible invasion of the petitioner's fundamental rights to due process.

"In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity or public reputation of judicial proceedings" (*United States* v. *Atkinson,* 297 U. S. 157, 160). *A fortiori* is this true when the introduction of this *ex parte* evidence is bitterly protested and exception duly noted (2943-53).

III.

As to the admission in evidence of prejudicial newspaper articles.

This point has been fully treated in the Petition (pages 22-4).

The respondent at page 19 attempts to gloss over our contention that the defendant's fundamental constitutional rights were violated in receiving in evidence these highly

inflammatory newspaper articles, by a nonchalant characterization of these newspaper clippings as "insignificant."

Was it "insignificant" to admit in evidence these newspaper articles (reproduced in the Record on Appeal, pages 1407, 1409, 1411) which purported to deal with the defendant and his past life; which contained statements relative to a man who had been murdered while the defendant was in custody awaiting trial and linked the death of this man—who was an alleged witness to the homicide—to the case then pending against the defendant?

Jackson, J., concurring in *Shepherd* v. *Florida,* 341 U. S. 50, at 53, said:

> "Newspapers, * * * may not deprive accused persons of their right to fair trial. These convictions, accompanied by such events, do not meet any civilized conception of due process of law. * * *"

The prosecutor must have known the ineradicable prejudice and suspicion such flagrantly unfair and sensational newspaper articles would engender against the defendant when he sought a new trial upon the ground of newly discovered evidence.

At page 14 of respondent's brief, he asserts that a "full-scale hearing was held [on the motion for a new trial] which lasted longer than the actual trial." The hearing was protracted, indeed, but the fundamental unfairness of the hearing speaks from the record itself and becomes the immediate palpable reaction when we consider the cumulative force of the basic constitutional errors of which we complain. This "full-scale hearing," infected with these gross errors, resolved itself into a mere formality, sham and pretense and clashed with the rudimentary requirements of justice.

In the Petition, we cited, among other authorities (p. 23) the case of *People* v. *Zackowitz,* 254 N. Y. 192, 198. Mr. Justice Cardozo, then Chief Judge of the Court of Appeals, quoted with approval, the following pertinent

language from Wigmore, *Evidence,* Vol. 1, sec. 194:

> "The natural and inevitable tendency of the tribunal—whether judge or jury—is to give excessive weight to the vicious record of crime thus exhibited, and either to allow it to bear too strongly on the present charge, or to take the proof of it as justifying a condemnation irrespective of guilt of the present charge."

IV.

As to inadequacy and invalidity of the Trial Court's charge.

This contention is fully presented in the Petition at pages 16, 24. Respondent cites at page 21, the case of *Buchalter* v. *New York,* 319 U. S. 427, 431, wherein this Court held, among other things, that the court's instructions under attack did not deprive the defendants of a trial according to the accepted course of legal proceedings. Obviously, the validity of a court's charge must depend on all the circumstances of the particular case.

In the case at bar, *three* judges dissented and voted for reversal and a new trial on the ground that the Court's charge did not "marshal the evidence" as required by *People* v. *Odell,* 230 N. Y. 481.

V.

As to the cases cited by respondent.

The authorities cited by respondent (p. 11) do not in any degree controvert the contentions made by the petitioner that he was deprived of due process of law in the four major particulars specified at pages 6-7 of the Petition.

These cases lend no support to respondent's position, because the facts therein are so widely different from the case at bar that a detailed discussion thereof would serve no useful purpose.

Brushing aside petitioner's contentions and the authorities cited in the Petition to sustain the jurisdiction of this Court, respondent assumes as the premise of his argument that no federal questions were properly raised or presented herein. As the premise is fallacious, the respondent's conclusions necessarily fail.

In framing the federal questions for presentation to the state court, the petitioner was not shackled by any iron bound formula. It was essential only that he bring the federal claims and the grounds therefor to the state court's attention with fair precision. Each case should be governed by the circumstances surrounding it and "if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as having been adequately presented" (*New York ex rel Bryant* v. *Zimmerman,* 278 U. S. 63, 67).

It is a total misconception of our position for respondent to assert that we maintain that mere errors as to state law are reviewable in this Court (Respondent's Brief, pp. 11-12; 21, quoting excerpt from *Buchalter* v. *New York,* 319 U. S. 427, at p. 431).

We cannot leave this subject without referring once more to petitioner's own statement to the trial court just before the petitioner was sentenced to death (4155-4187).

Protesting that he was denied and deprived of his fundamental rights to a fair, impartial and deliberate trial and was the victim of a gross miscarriage of justice, he exclaimed:

> "And for the benefit of the Justices of the High Courts, I say with extreme care, your Honors, the part this Court has played in this farce referred to as my trial, and see if it wasn't the killing of Basilio Paiutta that I was tried for, along with the killing of Walter Forlenza, which held little or no water at all" (p. 1393).

Surely there was nothing "vague and inferential" in the petitioner's own plea of denial of due process, when he solemnly declared:

> "* * * I nevertheless feel confident that in the final analysis, the High Court will take a hand in correcting this unexpected verdict, in which the weight of the evidence is definitely contrary to the verdict returned. That is what the High Courts are for, to see that the elementary concepts that stand ingrained in our legal framework are carried out to the very letter of our laws and stand to be used whenever life or liberty is in peril * * *" (R. p. 1395).

In final analysis, our contention is clearly expressed in the language of this Court in the *Buchalter* case, *supra,* at page 429:

> "The due process clause of the Fourteenth Amendment requires that action by a state through any of its agencies must be consistent with the fundamental principles of liberty and justice which lie at the base of our civil and political institutions, which not infrequently are designated as 'the law of the land.' Where this requirement has been disregarded in a criminal trial in a state court this court has not hesitated to exercise its jurisdiction to enforce the constitutional guarantee. * * *"

We have demonstrated as a reality and beyond question the total unfairness of the trial and the subsequent proceedings to which the defendant was subjected. This is not speculation and conjecture. The solid facts proclaim the defendant's denial of his constitutional rights upon the grounds set forth herein.

We respectfully submit that the record amply sustains the allegations of the Petition.

CONCLUSION

The writ of certiorari should be granted.

Respectfully submitted,

RUDOLPH STAND,
Counsel for Petitioner.

JACOB SHIENTAG,
Attorney for Petitioner.

Office - Supreme Court
FILED
NOV 4 19
HAROLD B. WILLEY

Supreme Court of the United States

OCTOBER TERM, 1954

No. 45 Misc.

LEONARDO SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

RUDOLPH STAND,
Counsel for Petitioner,
Office & P. O. Address,
80 Broad Street,
New York 4, N. Y.

JACOB SHIENTAG,
Attorney for Petitioner.

INDEX

PAGE

Petition for Rehearing 1

Reasons for Granting Rehearing 2

Conclusion 7

Certificate of Counsel 7

Table of Cases

Brinkerhoff-Faris Trust Co. v. Hill, 280 U. S. 604, 550, 281 U. S. 673 2

Buchalter v. New York, 318 U. S. 766, 797 3

Buchalter v. New York, 319 U. S. 427, 429 3

Cafeteria Employees Union v. Angelos, 319 U. S. 753, 778 3

Hickman v. Taylor, 327 U. S. 808, 328 U. S. 876, 329 U. S. 495 2

Hill v. Texas, 316 U. S. 400, 406 6

Malinski v. New York, 324 U. S. 401, 416-417 6

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1954

No. 45 Misc.

LEONARDO SALEMI,

Petitioner,

against

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The petitioner, LEONARDO SALEMI, a state prisoner confined in the Death House at Sing Sing Prison, Ossining, New York, respectfully prays that this Court grant rehearing of its order of October 14, 1954 denying his petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of New York, affirming by a closely *divided* Court of *four-to-three,* a judgment of conviction and sentence of death imposed by the Court of General Sessions, New York County, upon a verdict rendered by a special or so-called "blue ribbon" jury convicting petitioner of the crime of Murder in the First Degree.

Upon consideration of the application of counsel, a stay of execution of the death sentence was granted by Mr.

Justice Reed, pending the filing and final disposition of the petition for certiorari herein, as more particularly set forth in the order dated April 24, 1954.

This petition for rehearing is filed within the time prescribed in Rule 58 of the Revised Rules of this Court and is made pursuant to the provisions of the said Rule.

Reasons for Granting Rehearing and Issuing the Writ

I.

The petition for certiorari presented substantial Federal questions of the gravest importance under the Due Process Clause of the Fourteenth Amendment in four major particulars enumerated at pages 6-7 of the petition which justified a review of the case.

II.

There is no basis whatever for respondent's bare assertion that the Court of Appeals obviously decided the case upon state grounds in the first instance.

In presenting this application we have clearly in mind the limitations of Rule 58 governing the filing of a petition for rehearing after denial of certiorari.

We do not file this petition to gratify a desire to argue once more the very questions which have already been submitted to this Court. Because we are so convinced that there was a denial of due process in this case, we can only believe that the Court's adverse decision herein, may well have resulted from an inadequate presentation of the petitioner's contentions in a case in which his life is at stake.

Our study of the cases in this Court reveals that in a few instances, a successful petition for rehearing did no more than clarify the arguments advanced in the original petition for certiorari. (*Hickman* v. *Taylor,* 327 U. S. 808, 328 U. S. 876, 329 U. S. 495; *Brinkerhoff-Faris Trust Co.* v. *Hill,* 280 U. S. 60[illegible], 550, 281 U. S. 673.)

In *Cafeteria Employees Union* v. *Angelos*, 319 U. S. 753, 778, it appears that the petition for certiorari to the Court of Appeals of New York was denied on the ground expressly noted: "that it does not appear from the record that the federal question presented by the petition was properly presented to or expressly passed on by the New York Court of Appeals." A petition for rehearing was granted and the order denying certiorari, *ante*, page 753, vacated. The petition for writ of certiorari to the Court of Appeals was thereafter granted.

These were civil cases. Turning now to a capital case, it is interesting to note that in *Buchalter* v. *New York*, 318 U. S. 766, 797, the original petition for writ of certiorari to the Court of Appeals was denied. The petition for rehearing was granted and the order denying certiorari, *ante*, page 766 vacated and the petition for writ of certiorari was thereafter granted.*

If this Court can be persuaded in the light of the record, that the petitioner has presented sufficient proof regarding the matters specified below:

As to the Insane Witness, Paul Janson:

(a) That the prosecutor was advised by the police of Janson's attempted suicide the day before the trial commenced (2266-2267);**

(b) That the prosecutor was further informed by the police of Janson's mental breakdown during the progress of the trial (2236-2245);

---

* As we pointed out in our original petition referring to the *Buchalter* case (p. 24) this Court "granted certiorari in order that the petitioners' claims of denial of a federal right might be examined in the light of the record with the aid of briefs and oral argument" (*Buchalter* v. *New York*, 319 U. S. 427, 429).

** References, unless otherwise indicated, are to the folios of the certified record on appeal submitted on filing of the original petition for certiorari.

(c) That the prosecutor withheld from the jury and the defense these vital facts involving the only eyewitness to the alleged homicide;

(d) That Janson—on whose testimony the prosecution relied—was insane and mentally incompetent at the time he testified, which fact was not disclosed to the defense and not revealed to the jury;

(e) That upon the discovery of Janson's insanity and his commitment to Bellevue Hospital as an insane person at the instigation of the District Attorney's psychiatrist the day after the verdict was rendered, an application was made for a new trial upon the ground of newly discovered evidence and the deprivation of the defendant's constitutional rights (pp. 600-673; see fols. 1805-1806 et seq.);

As to the Grand Jury Testimony of the Deceased Witness, Basilio Pauitta:

(f) That the trial court over the protest of the defense read to the jury, after the verdict, testimony given before the Grand Jury by a witness (Basilio Pauitta) who had died before the trial (pp. 589-591); that the trial court denied defendant's request that this Grand Jury testimony be excluded from the record (p. 592); that upon the hearing for a new trial, the defense unsuccessfully renewed its application to expunge this highly prejudicial matter from the record (pp. 981-987);

As to Admission in Evidence of the Entire Grand Jury Minutes:

(g) That the trial court upon the hearing for a new trial received in evidence all of the testimony given by witnesses called before the Grand Jury, despite objection that these witnesses had not tes-

tified at the trial; that the defendant had the right to be confronted by these alleged witnesses and had the right to cross-examine them (pp. 981-987);

As to Admission in Evidence of Inflammatory Newspaper Reports:

(h) That the trial court received in evidence, over objection (p. 890), newspaper articles concerning the alleged murder before trial of a Grand Jury witness (Basilio Pauitta) which contained statements linking the death of this man to the case then pending against the defendant and which newspaper articles purported to deal with the defendant and his past life (p. 890; pp. 1407, 1409, 1411);

As to the Trial Court's Charge:

(i) That the trial court's charge did not marshal any of the evidence in the case, and charged only general legal abstractions (pp. 540-585);

we are confident it would then decide that what occurred at this trial and upon the hearing for a new trial was so serious a denial of due process to warrant its intervention.

It seems to us that the initial point of inquiry is whether the petitioner has made out a *prima facie* case of a denial of due process under the Federal Constitution. We respectfully submit that the unusual facts and circumstances disclosed by the record merit review by this Court.

The respondent has failed to point out any non-federal ground adequate to support the judgment of death imposed on the petitioner.

This Court has repeatedly acted when convinced that fundamental due process has been denied. In this case, the conclusion that this has occurred stems from no single

incident; it rests upon a cumulation of errors to which we have referred in the original petition for certiorari.

Mr. Chief Justice Stone, delivering the unanimous opinion of this Court in *Hill* v. *Texas*, 316 U. S. 400, 406, declared:

> "It is the State's function, not ours, to assess the evidence against a defendant. But it is our duty as well as the State's to see to it that throughout the procedure for bringing him to justice he shall enjoy the protection which the Constitution guarantees."

The test which this Court applies in examining due process violations in state courts has been stated as follows by Mr. Justice Frankfurter in *Malinski* v. *New York*, 324 U. S. 401, 416-417:

> "Judicial review of that guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples even toward those charged with the most heinous offenses."

Due process of law is not merely the shadow or semblance of a trial. Considering the close decision of affirmance by the Court of Appeals there is certainly reasonable doubt whether the petitioner received a fair trial.

We submit that no judgment, especially in a capital case, ever should go unreviewed in this Court, where the mind of anyone studying the record is oppressed with a distressing doubt not only as to the justice of the verdict but the fundamental unfairness of the trial itself and the subsequent proceedings to which the petitioner was subjected.

When Janson—the sole eyewitness to the alleged homicide—was committed to the Psychiatric Ward at Bellevue Hospital, he said he "*was not sure of the man who did the*

shooting'' (1943). At Pilgrim State Hospital for the Insane, the official admission note on December 4, 1952, relating to Janson set forth that *he said he did not see the shooting but identified the man in Court, and then was not sure and that was the reason he attempted suicide* (1986).

The death penalty is final—it leaves no margin for mistake or the correction of a tragic blunder of justice.

Can there be a serious question as to the fundamental merit of petitioner's contention that he has been deprived of due process of law in the four major particulars enumerated at pages 6-7 of the petition?

Conclusion

For the reasons assigned herein and in the petition for writ of certiorari, and petitioner's reply brief, it is respectfully urged that rehearing be granted and that, upon such rehearing, a writ of certiorari issue to the Court of Appeals of the State of New York as prayed in the petition.

Respectfully submitted,

RUDOLPH STAND,
Counsel for Petitioner.

JACOB SHIENTAG,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the Revised Rules of this Court.

RUDOLPH STAND,
Counsel for Petitioner.